RECENT DECISIONS.

ADMIRALTY—ABANDONMENT—EFFECT UPON CONTRACT OF AFFREIGHTMENT.—A vessel en route from Pensacola to Montevideo having been abandoned was subsequently picked up and brought into Boston. The master sought possession of the vessel and cargo in order to complete the voyage, but the cargo owner disputed his right to continue the contract of affreightment. *Held*, four justices dissenting, an abandonment at sea gives the cargo owner an irrevocable right to treat the contract as at an end. *The Eliza Lines* (1905) 26 Sup. Ct. Rep. 8.

This decision is in accord with the English rule, *The Cito* (1881) L. R. 7 Pro. D. 5, but is the first definitive treatment of the subject in this country. See *Lewis* v. *Elizabeth and Jane* (1823) 1 Ware 33. It is based upon the supposition that a forced abandonment at sea is indicative of an intention to repudiate the contract of affreightment; but that this is erroneous is clear from the fact that in most of the reported cases the master has sought to recover the vessel and continue the voyage. The better rule would seem to be that the cargo owner's option to treat the contract as at an end arises only where the master's failure to continue the voyage has been so protracted as to amount to a breach going to the essence of the contract. Holmes, J., seems to favor the earlier English rule that an abandonment ipso facto ends the contract. *The Kathleen* (1874) L. R. 4 Adm. & Ecc. 269.

ADMIRALTY—TORTS—FELLOW-SERVANT.—The plaintiff, while unloading a ship as the servant of a master stevedore, was injured by a steam winch operated by a servant of the defendant. Both winch and servant had been loaned to the plaintiff's master and were under his control. *Held*, the plaintiff having alleged merely negligence in furnishing a competent winchman may not on trial set up a single act of negligence on the part of such winchman. In any case such negligence could avail the plaintiff nothing, since the winchman was his fellow-servant. *The Steamship Elton* (appellant) v. *Peter Bellew*, U. S. C. C. A. 3d Circuit, Jan. 2, 1906.

This elaborate dictum is of importance, since Gray, J., in his opinion expressly disapproves *The Slingsby* (1903) 120 Fed. 748, and paves the way for a reversal of that case. His opinion will likewise cast doubt upon *The Gladistry* (1904) 128 Fed. 591, and *McGough* v. *Ropner* (1898) 87 Fed. 534, cases contra. The weight of authority supports Gray, J. *Rouke* v. *Collier Co.* (1877) 2 C. P. D. 205; *Donovan* v. *Laing* (1893) 1 Q. B. 629.

ATTORNEYS—ADMISSION TO BAR—PENDENCY OF DISBARMENT PROCEEDINGS IN ANOTHER STATE.—One Hovey had applied for and obtained admission to the California bar, but had failed to disclose at the time of admission that disbarment proceedings were pending against him in another state. Later, because of this, an action was begun to disbar him in California. Meanwhile, the proceedings in the other state had resulted in his vindication. *Held*, it not being clear that the pendency of the disbarment proceedings was present in the applicant's mind because of his then weakened physical condition, his failure to disclose was insufficient evidence of such a bad moral character as would require disbarment. *In re Hovey* (Cal. 1905) 81 Pac. 1019.

The power to disbar is discretionary and should be exercised with great caution. *Ex parte Burr* (1824) 9 Wheat. 531. But the courts generally exercise the power where the attorney has been guilty of a crime, *In*

re Kirby (1898) 10 S. D. 414, even though pardoned; *In the Matter of*—— (1881) 86 N. Y. 563; but see *Scott* v. *State* (1894) 6 Tex. Civ. App. 343; or has a generally bad character within or without the course of his profession; *In re Percy* (1867) 36 N. Y. 651; *People* v. *Payson* (1905) 215 Ill. 476; or has been guilty of fraud in obtaining admission. *Case of Lowenthal* (1882) 61 Cal. 122. The facts in the principal case would not seem to constitute fraud, *In re Baum* (1890) 10 Mont. 223, and the case is otherwise clearly within the decisions.

CARRIERS—PASSENGERS—TERMINATION OF RELATION.—A passenger, having unnecessarily lingered in the station for ten minutes after alighting at his destination, was injured on leaving the station by falling over a loose tie. *Held*, by voluntarily lingering, he had terminated his status as a passenger. *Glen* v. *Railroad Co.* (Ind. 1905) 75 N. E. 283.

A passenger remains such until he has had, under all the circumstances, a reasonable time to leave the station, 1 COLUMBIA LAW REVIEW 129, or to alight from the cars; *Chicago, etc., R. R. Co.* v. *Frazer* (1895) 55 Kan. 582; and he must leave, in a proper manner, the cars, *McKimble* v. *Railroad* (1885) 139 Mass. 542, and the station. *Allerton* v. *Railroad* (1888) 146 Mass. 241. The principal case is the converse of the general rule that one is a mere licensee who, intending to buy a ticket, enters a station, and, being unable to purchase, remains there. *Heinlin* v. *Railroad* (1888) 147 Mass. 136. The principal case is directly supported by *Brunswick, etc., R. R. Co.* v. *Moore* (1897) 101 Ga. 684; *Davis* v. *Railroad* (1900) 25 Tex. Civ. App. 8.

CORPORATIONS—SERVICE OF PROCESS—AGENT APPOINTED BY STATE.—The defendant, a non-resident domestic corporation, was incorporated under a general statute, which reserved the right to alter any charter or to alter or repeal any law applicable, and also provided that the corporation should appoint an agent to accept service of process. A subsequent statute constituted the State Auditor an attorney in fact to accept service for such corporation. The State brings mandamus to compel the defendant to execute a power of attorney in accordance with the act. *Held*, the act was constitutional. *State* v. *St. Mary's Franco-American Petroleum Co.* (W. Va. 1905) 51 S. W. 865.

Under its sovereign powers a State may provide by statute for other than personal service upon its own citizens to sustain a personal judgment, *Harryman* v. *Roberts* (1879) 52 Md. 64; *Cassidy* v. *Leitch* (1877) 2 Abb. N. C. 315, even when the citizen is temporarily absent from the State; *Sturgis* v. *Fay* (1861) 16 Ind. 429; *Matter of Denick* (1895) 92 Hun, 161; but to be constitutional within the due process of law provision, the statute must make it reasonably probable that the defendant will receive notice of the pendency of the suit. *Betancourt* v. *Eberlin* (1882) 71 Ala. 461; *Matter of the Empire City Bank* (1858) 18 N. Y. 199. As the statute in the principal case fails in this, its constitutionality cannot be upheld as an exercise of the State's sovereignty to render effective the jurisdiction of its courts, *Pinney* v. *Providence Loan and Investment Co.* (1900) 106 Wis. 396, unless it can be said that the statute by implication directs the auditor to communicate notice of process to the corporation. *Town of Hinckley* v. *Kettle River R. Co.* (1897) 70 Minn. 105. However as the right of a corporation to appoint its own agent is an incident to its franchise, Mechem, Agency § 44, the statute comes within the reserved amending power. *Dartmouth College* v. *Woodward* (1819) 4 Wheat. 578, 712.

CORPORATIONS—SERVICE OF PROCESS—WITHDRAWAL FROM STATE AND REVOCATION OF AGENT'S AUTHORITY.—A statute provided that no foreign corporation should do business in the state until it designated

to colored nurses only is clearly unconstitutional as within the rule that laws applicable only to a class must affect equally all persons within it. *Barbier* v. *Connolly* (1884) 113 U. S. 27; 5 COLUMBIA LAW REVIEW 60.

CONSTITUTIONAL LAW.—POLICE POWER.—SALES OF MERCHANDISE IN BULK.—The plaintiff brought action to have the sale of the stock of a tailoring establishment in New York set aside, as not in compliance with S. L. 1902 chap. 528, which provided that the sale of a stock of merchandise in bulk should be void against creditors, unless both seller and purchaser made an inventory, and unless the purchaser notified each creditor of the cost price and the price to be paid by him for the stock, five days before the sale. *Held*, the statute was unconstitutional as interfering with the freedom of contract. *Wright* v. *Hart* (1905) 182 N. Y. 330.

While statutes relating to the public health and safety are universally recognized as within the police power of the state, *Beer Co.* v. *Mass* (1877) 97 U. S. 25, more difficulty exists concerning those relating to the public welfare. However, laws regulating the conduct of various occupations are upheld. *Lawton* v, *Steele* (1894) 152 U. S. 133; *Otis* v. *Parker* (1903) 187 U. S. 606. The legislatures may enact laws to prevent fraud, Tiedeman, Limitations § 89, and by the weight of authority statutes substantially like the one in the principal case are constitutional, *Squire & Co.* v. *Tellier* (1904) 185 Mass. 18; *McDaniels* v. *Connelly Shoe Co.* (1902) 30 Wash. 549, except where a criminal penalty has been imposed. *Block* v. *Schwartz* (1904) 27 Utah 387. The decision, however, seems to represent the modern tendency of introducing a standard of reasonableness above that of legislative policy. Freund, Police Power § 63.

CONSTITUTIONAL LAW—WATER COURSES—STATE CONTROL.—The State sought to restrain the defendant from transporting water by mains from the Passaic River to a point outside the State, contrary to the statute. *Held*, the State as a riparian owner has the right to have the waters come to the State lands undiminished except as affected by the rights of upper riparian owners, *McCarter* v. *Hudson County Water Co.* (N. J. 1905) 61 At. 710. See NOTES, p. 113.

CONTRACTS—COMPELLING EMPLOYER TO EMPLOY UNION LABOR.—The defendant employer contracted with a labor union to employ only members of its union in good standing. He failed to perform. The union then brought suit on a promissory note given by the defendant to secure due performance. *Held*, such a contract was valid. *Jacobs* v. *Cohen* (1905) 183 N. Y. 207.

The decision overrules the holding of the lower court, 90 N. Y. Supp. 854, and follows, in its reasoning and conclusions, the position taken by the REVIEW in a criticism of the case as it was decided below. 5 COLUMBIA LAW REVIEW 239.

CONTRACTS—EFFECT OF INSANITY—NEGOTIABLE PAPER.—The payee of a promissory note, subsequently becoming insane, transferred the note to the plaintiff who sued the maker. *Held*, the defendant transferred no title since an insane person cannot contract. *Walker* v. *Winn* (Ala. 1905) 39 So. 12. See NOTES, p. 115.

CONTRACTS—THEATRE TICKETS—SPECULATORS.—The defendants as proprietors of a theatre issued tickets of admission bearing this condition, "If sold on the sidewalk, this ticket will be refused at the door." They placed signs at the theatre entrance and employed private detectives to warn people that the condition would be enforced. The plaintiff, a licensed speculator, applied for an injunction against the defendants on the ground that his business was being ruined through their acts. *Held*, the defend-

ants could issue tickets subject to this condition and had a right to notify purchasers that it would be enforced. *Collister* v. *Hayman* (N.Y. 1905) 34 N. Y. L. J. 871.

In declaring that a theatre ticket is a mere license issued pursuant to a contract, and revocable, the court followed the admitted weight of authority. *Wood* v. *Leadbitter* (1845) 13 M. & W. 838; *Purcell* v. *Daly* (1886) 19 Abb. N. C. 301. But under the plaintiff's pleadings it is difficult to see how the nature of the right in the ticket was involved. The defendants were acting within their legal rights in persuading others not to buy from the plaintiff, *Guetler* v. *Altman* (1901) 26 Ind. App. 587; *Robison* v. *Texas Pine Land Ass.* (Tex. 1897) 40 S. W. 843, and the plaintiff has failed to set out a cause of action. The effect of the condition on the ticket would be to make it impossible for the plaintiff to ask for any relief in equity.

CRIMINAL LAW—DOUBLE JEOPARDY.—Two indictments were found against defendant, respectively charging the commission on the same day of rape on and incest with the same female, under the age of consent. On the trial for rape, the State was permitted to prove all acts of intercourse within the period of the Statute of Limitations, but on motion of defendant it relied on one act. Defendant was acquitted. On a subsequent trial for incest, the State relied on an act committed on a different date. *Held*, the plea of former acquittal was good on demurrer, both at common law and under a statute. *State* v. *Price* (Iowa 1905) 103 N. W. 195. See NOTES, p. 110.

CRIMINAL LAW—HOMICIDE—CHARGE TO JURY—MALICE.—In a prosecution for murder the court correctly defined malice as provided by a section of the code, and then gave a further definition (taken from another section) which was inapplicable to the case. *Held*, such an erroneous instruction was not a ground for reversal. *People* v. *Waysman* (Cal. 1905) 81 Pac. 1087.

The charge of a court is to be considered as a whole, *Hodges* v. *State* (1886) 22 Tex. App. 415, and an isolated instruction, although erroneous or misleading, is no ground for reversal if the instructions as a whole present the case properly. *Cowen* v. *People* (1853) 14 Ill. 348. But a charge which is unfair unless explained and which is calculated to prejudice the defense of the accused is erroneous, *Wicks* v. *State* (1870) 44 Ala. 398, and where inconsistent charges are given, one of which is erroneous, the jury is presumed to have followed that. *Steinmeyer* v. *People* (1880) 95 Ill. 383; *People* v. *Berlin* (1894) 10 Utah 39. Moreover, such a charge, not withdrawn, is not cured by a subsequent correct charge on the same point. *People* v. *Hill* (1892) 65 Hun, 420; Thompson, Trials §§2326, 2407. In the principal case, malice having been so defined as possibly to prejudice the prisoner, the verdict should have been set aside. *Hays* v. *State* (1883) 14 Tex. App. 330.

EQUITY—INJUNCTION—PICKETING BY STRIKERS.—The defendant strikers maintained a "picket" line around the plaintiff's premises, using toward the plaintiff's workmen threatening and profane language, but offering no violence. *Held*, the defendants were in contempt for violation of an injunction against unlawful interference with the plaintiff's business. *Atchison, etc., Ry.* v. *Gee* (1905) 139 Fed. 582.

Injury to occupation or business by unwarranted interference with employes has long been recognized as a civil wrong, 1 COLUMBIA LAW REVIEW 123, though, as regards the rights of the injured employé, somewhat modified in England, *Allen* v. *Flood* [1898] A. C. 1, and to some extent in this country. 2 COLUMBIA LAW REVIEW 400. Although there is no logical distinction between occupation and business in this connection, the remedy in favor of the employer, by legal action, *Carew* v. *Rutherford*

(1870) 106 Mass. 1, and more frequently by injunction, *U. P. Ry. Co.* v. *Ruef* (1902) 120 Fed. 102, is seldom denied, at least where the interference is accompanied by violence, *Allis Chalmers Co.* v. *Reliable Lodge* (1901) 111 Fed. 264, or threats of violence. *Am. Steel & Wire Co.* v. *Unions* (1898) 90 Fed. 608. If the right of action be on the theory of a wilful injury without lawful excuse, 2 COLUMBIA LAW REVIEW 37, 39, it may well exist although no violence appears if actual injury is done. *Walker* v. *Cronin* (1871) 107 Mass. 555. And when such injury would be continuous or irreparable, the remedy by injunction should go to the same extent. *Sherry* v. *Perkins* (1888) 147 Mass. 212.

EVIDENCE—MEMORANDUM SUBSTITUTED FOR RECOLLECTION—NOT WRITTEN BY WITNESS.—A memorandum was sought to be introduced as evidence of a transaction between defendants and witness. The latter, even after consulting the memorandum had no independent recollection of the facts embodied therein. *Held*, the memorandum was inadmissible as a substitute for witness' recollection, since it was neither written by him nor could he testify that it was accurate when made. *McCarthy* v. *Meaney* (1905) 183 N. Y. 190.

At an early date the South Carolina courts admitted memoranda as a substitute for recollection where the witness could testify as to their accuracy when made, *State* v. *Rawls* (1820) 2 Nott & McCord 332, and after a struggle, *Lawrence* v. *Barker* (1830) 5 Wend. 301, the New York courts followed. *Merrill* v. *R. R.* (1837) 16 Wend. 586, 598. The holding of the court in the principal case is sound, since the witness could not testify as to the accuracy of the memorandum when made. The further limitation laid down in *Gilchrist* v. *B'klyn* (1875) 59 N. Y. 495, and *Howard* v. *McDonough* (1879) 77 N. Y. 592, followed in the principal case, that the memorandum must have been written by the witness himself, seems too narrow. *Clark* v. *Bank* (1898) 32 App. Div. 316, 322, aff'd (1900) 164 N. Y. 498; 1 Wigmore Evid. § 748.

LIBEL—CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTE RESTRICTING COMMON LAW REMEDY.—An Ohio statute declared that if the publisher of a libel, "upon demand" made a full retraction, the presumption of malice arising from the libel should thereby be rebutted. *Held*, statute should only operate where the retraction is made pursuant to plaintiff's demand; otherwise the statute would be unconstitutional. *Post Pub. Co.* v. *Butler* (1905) 137 Fed. 723. See NOTES, p. 117.

PLEADING AND PRACTICE—CONFLICT OF JURISDICTION—PRIOR ATTACHMENT BY FEDERAL COURT.—Real property of the defendant, attached in a suit brought by the plaintiff in a Federal court, was later seized and sold by receivers appointed in a State court under insolvency proceedings. The plaintiff having obtained judgment in the former action, the marshal's sale was stayed by the State court. *Held*, the Federal court would not enjoin further proceedings by the State court to prevent such sale. *Ingraham* v. *National Salt Co.* (1905) 139 Fed. 684. See NOTES, p. 112.

PLEADING AND PRACTICE—EXCESSIVE DAMAGES—REMITTITUR.—In an action for libel, the jury found a verdict for the plaintiff for a sum which the Court of Appeals considered excessive. *Held*, the court had no jurisdiction, without the defendant's consent, to order that unless the plaintiff would consent to reduce the damages, there should be a new trial. *Watt* v. *Watt* [1905] App. Cas. 115.

The principal case is in conflict with the great weight of American authority which permits a remittitur in tort actions where damages cannot be mathematically computed and the only error is excessive damages.

Ark. Valley Land, etc., v. *Mann* (1889) 130 U. S. 69; *Branch* v. *Bass* (Tenn. 1858) 5 Sneed 366; *Noxon* v. *Remington* (Conn. 1905) 61 Atl. 963; *Heimlich* v. *Tabor* (Wis. 1905) 68 L. R. A. 669; Sutherland, Damages, 3rd ed. § 460. Contra: *Gulf, etc., Ry. Co.* v. *Coon* (1888) 69 Texas 730; and see Hale, Damages 234. As the American principle renders it possible for the court to encroach upon the functions of the jury, the doctrine of the principal case seems the safer one, 5 COLUMBIA LAW REVIEW 166, although it is open to the criticism of delaying the administration of justice and unnecessarily increasing the costs of litigation.

PLEADING AND PRACTICE—GARNISHMENT—WAIVER OF EXEMPTION.—The wages of a laborer, with his consent, were garnished under the Code. *Held*, the exemption of laborer's wages up to $25 could not be waived, and that the constitutional right to waive all exemptions did not apply to exemptions from garnishment. *Richardson* v. *Kaufman* (Ala. 1905) 39 So. 308.

Garnishment in Alabama and in this country generally is a proceeding of purely statutory creation, *Jones Adm'r* v. *Crews* (1879) 64 Ala. 368; *Rindge* v. *Green* (1879) 52 Vt. 204, derived historically from the custom of London and Exeter. *White* v. *Simpson* (1894) 107 Ala. 386; *Railroad* v. *Crane* (1882) 102 Ill. 249; 1 Comyn's Dig. 449; 1 Rolle's Abr. 552. For an early statute see 2 Mass. Pub. Laws, 673 (Feb. 28, 1795). Therefore the right to garnish exists only where created by statute. *Picquet* v. *Swan* (1827) 4 Mason 443; *Fisher* v. *Consequa* (1809) 2 Wash. (C C) 382. The Alabama code creates no such right against wages up to $25. Hence the exemption of the wages is due to a lack of right in the plaintiff, not in the debtor's inability to waive an exemption. It follows that the constitutional guaranty of the right of waiver does not apply.

PLEADING AND PRACTICE—JUDGMENT CREDITOR—ASSIGNABILITY OF RIGHTS OF REDEMPTION.—By statute judgment creditors were given the right to redeem a debtor's property from an execution sale. *Held*, this was a privilege personal to those named in the statute and did not pass by the assignment of a judgment. *Chambers* v. *Pollak* (Ala. 1905) 39 So. 316.

In this interpretation of the statute, the court expressly adopts the rules of construction previously applied to a statute regulating the assignment of a mortgagor's equity of redemption after foreclosure by the mortgagee. *Powers* v. *Andrews* (1888) 84 Ala. 289. But as, in judgments, the right to redeem is incident to the ownership of the judgment, it would seem immaterial whether the party suing is the judgment plaintiff or his assignee, Freeman, Executions § 317, and under a statute similar to that of the principal case, the assignee has been held a judgment creditor in contemplation of law. *Van Rensselaer* v. *Sheriff* (1823) 1 Cow. 443, (the present New York statute expressly confers this right on the assignee, R. S. § 1450); *Sweezey* v. *Chandler* (1849) 11 Ill. 445. This latter view accords with the weight of authority and seems the better on principle.

STATUTES—EXECUTION AGAINST WAGES—PHYSICIAN'S SERVICES.—A statute provided that execution might issue against the wages of the judgment debtor "when a judgment has been recovered wholly for necessaries sold, or work performed in a family as domestic." The plaintiff as assignee of a surgeon's claim for services rendered to the defendant's wife, seeks to bring himself within the statute on the theory that the services were necessaries sold. *Held*, if the statute is construed as a whole, the express mention of the services of a domestic shows the legislative intent to exclude all other kinds of service. *Taylor* v. *Barker* (1905) 95 N. Y. Supp. 474.

At common law the term "necessaries" included a physician's services, *Mayhew* v. *Thayer* (Mass. 1859) 8 Gray 172, and also work performed by a domestic. *Flynn* v. *Messenger* (1881) 28 Minn. 208; *Phillips* v. *Sanchez* (1895) 35 Fla. 187. The express mention of the latter kind of service after using the expression "necessaries sold" suggests that the expression was used in its popular rather than its legal sense, and so refers only to goods and chattels bought. Therefore, under the maxim *expressio unius est exclusio alterius*, it is clear that the principal case should be supported.

TAXATION—TRUST FUND.—The plaintiff, a testamentary trustee appointed by a Connecticut court, holding as the res stocks and bonds deposited in New York, was domiciled in Ohio. *Held*, the res was not taxable in Ohio, because the trustee, being under the control of a Connecticut court, did not "exercise his office" in Ohio. *Goodsite* v. *Lane* (1905) 139 Fed. 593.

It is well settled that tangible personal property, wherever located, is taxable in the place where the owner is domiciled, *Kirtland* v. *Hotchkiss* (1879) 100 U. S. 491, and that for this purpose the trustee is the owner of the res, Perry, Trusts § 331; Cooley, Taxation, 3rd ed. 660, irrespective of the location of the court under whose direction the trust is created, *In re Ailman* (1891) 17 R. I. 362, even though some cestuis, the res, and the supervising court may all be without the jurisdiction. *Guthrie* v. *Railroad* (1893) 158 Pa. St. 433. The principal case seems to represent the old theory that protection to the taxpayer, not jurisdiction, is the test of the extent of the taxing power. See Cooley Taxation, 3rd ed., 1, 22–23. For a criticism of the general doctrine and a statement of its remarkable possibilities, see 5 COLUMBIA LAW REVIEW 50.

TRUSTS—BANK COLLECTIONS—METHOD OF REMITTING.—A deposited a check "for collection" with the B bank, who forwarded to the C bank "for collection." The C bank collected and remitted by its own draft on a New York bank, then becoming insolvent, payment on the draft was refused by order of its receiver. A sued the B bank. *Held*, the defendant had not acted beyond the scope of its authority. The plaintiff's remedy was against the C bank, the trust attaching pro tanto to the mingled funds of the C bank, although there might be a general custom among banks for remittances to be made as had been done. *Holder* v. *Western German Bank* (1905) 136 Fed. 90. See NOTES, p. 116.

WATERS AND WATER COURSES—APPROPRIATION—ADVERSE USER.—In 1890 the plaintiffs' grantors appropriated all the low waters of a stream. In 1891 the defendant, knowing of prior appropriators, and not intending to deprive them of water, having located higher up, appropriated surplus water, using enough for her land since 1894. At times in dry seasons she had, at request of plaintiffs' grantors, turned water down to them. *Held*, by the trial court, the defendant was entitled by adverse user to water for her land "at all seasons of the year, and at all times." The supreme court, ignoring this holding, affirmed the decree on the ground of prior appropriation. *Minnie Maud Reservoir Co.* v. *Grames* (Utah 1905) 81 Pac. 893.

There can be no adverse use as long as the waters of a stream are sufficient for all. *Anaheim Water Co.* v. *Semitropic Water Co.* (1883) 64 Cal. 185. The burden of proof is on the party setting up title to water by adverse user, to prove that his use was adverse to the prior appropriator, continuous and uninterrupted for the statutory period. *Smith* v. *North Canyon Water Co.* (1898) 16 Utah 194; *American Co.* v. *Bradford* (1865) 27 Cal. 361; Gould, Waters § 332. A permissive use, or an infringement of plaintiff's rights for the statutory period is not sufficient, if there has been any acknowledgment of those rights or any act of ownership, how-

ever slight, on his part. *Smith* v. *North Canyon Water Co.*, supra; *Ledu* v. *Jim Yet Wa* (1885) 67 Cal. 346; Gould, Waters, supra. The decision is wrong on all points. The finding of a prior appropriation by defendant is directly contrary to the evidence. The dissenting opinion of Straup, J., is correct.

WATERS AND WATER COURSES—RIPARIAN RIGHTS—APPROPRIATION.—Plaintiff as prior appropriator of water for irrigating purposes sought to enjoin upper riparian owners from so using the water. *Held*, prior to the statute of 1886 authorizing the acquirement of rights in running water by prior appropriation, the common law doctrine of riparian rights prevailed in the State of Kansas, and local customs to the contrary were invalid. The rights of the parties having vested before 1886 were not affected by subsequent legislation. *Clark* v. *Allaman* (Kansas 1905) 80 Pac. 571.

The decision is correct. The Western doctrine of prior appropriation may exist in the same state with the common law doctrine of riparian rights, but the former is limited to public lands. Legislation abrogating the doctrine of riparian rights and substituting the rule of prior appropriation does not affect vested riparian rights. *Crawford* v. *Hathaway* (Neb. 1903) 93 N. W. 781. A riparian owner has a vested common law right to a reasonable use of the water for irrigation, in derogation of which a lower appropriator can acquire no rights by prescription merely because the riparian owner has not exercised them. *Hargrave* v. *Cook* (1895) 108 Cal. 72.

WILLS—ELECTION BETWEEN LEGACY AND DOWER.—The defendant's testator bequeathed $9,000 to plaintiff's testator, the widow, in lieu of dower. The statute provided that in such cases of testamentary provision unless the widow elected within one year to take the dower she was deemed to have elected to take under the will. Real Property Law §§ 180, 181. The widow died within the year, without having made an election. *Held*, the presumption did not apply because the widow died within the year, but that her death vested the right to collect the legacy in her executor. *Flynn* v. *McDermott* (1905) 183 N. Y. 62.

In some statutes the right of the widow to take dower or a distributive share in her husband's estate, when provision is made in his will in lieu thereof, is termed an election, *Young* v. *Boardman* (1888) 97 Mo. 181, in others, a waiver or renunciation of the will. *Atherton* v. *Corliss* (1869) 101 Mass. 40. But whatever the right, it is so strictly personal to the widow, that it cannot be exercised by the guardian of an insane widow, *Van Steenwyck* v. *Washburn* (1884) 59 Wis. 483, though the election has been sustained where made by the guardian with the court's consent. *Andrews* v. *Bassett* (1892) 92 Mich. 449. Nor does the right pass to representatives or heirs of a widow, though she die before the expiration of the period allowed her for decision. *Crozier's Appeal* (1879) 90 Pa. St. 384. The principal case is therefore sound.